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No. 02-889

In the Supreme Court of the United States

ALLAN R. CRUMP, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a sale of certain real property owned by petitioner and his wife was conducted in compliance with Section 6335 of the Internal Revenue Code, 26 U.S.C. 6335.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7) is not published in the *Federal Reporter*, but is *reprinted in* 29 Fed. Appx. 556. The opinion of the district court (Pet. App. C1-C8) is unofficially reported at 87 A.F.T.R.2d (RIA) 1020.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2002. The petition for rehearing was denied on September 10, 2002 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 3, 1993, the Internal Revenue Service (IRS) seized the residence of petitioner and his wife for their nonpayment of past due internal revenue taxes.[1] The IRS Revenue Officer served the notices of seizure and sale by placing them in an envelope taped to the front door of the residence. Pet. App. B3-B4, C3. The IRS thereafter delegated responsibility for conducting the sale of the property to Roller and Associates, a private auction company. *Id.* at B7, C6.

2. After the IRS seized the real property, petitioner and his wife filed a Chapter 13 bankruptcy proceeding. Pet. App. B3, C3. The IRS obtained an order in that proceeding lifting the automatic stay on the sale of the real property and, on December 1, 1993, sold the property to respondents Michael and Judy Pippin. Following the sale, petitioner and his wife commenced an adversary proceeding in the bankruptcy court to quiet title in the property in their favor. *Id.* at C3. The bankruptcy court granted summary judgment for the United States and quieted title in the Pippins. *Id.* at B3, C3.

On February 5, 2001, the district court entered an order affirming the bankruptcy court's judgment. Pet. App. C1-C8. The district court determined that, by taping the notices of seizure and sale to the front door of petitioner's "usual place of abode," the IRS satisfied the service requirements of Section 6335(a) and (b) of the Internal Revenue Code and the requirements of due process. Pet. App. C5. The court further held that Section 6335(e)(1)(A) and (e)(2) of the Internal Revenue Code authorize the IRS to delegate authority to con-

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[1] Petitioner's wife, Shirley A. Crump, has since died.

duct the sale of seized property to a private auction company. Pet. App. C6-C7.

3. The court of appeals affirmed. Pet. App. B1-B7. The court rejected petitioner's argument that Section 6335 requires that notices of seizure and sale be left with a person of competent age and discretion who resides at the abode. The court pointed out that "[t]he statute * * * does not require this" and instead "only requires that the notice[s] 'be left at [the] usual place of abode . . . where the seizure is made.'" Pet. App. B4 (quoting 26 U.S.C. 6335(a)).

The court also rejected petitioner's argument that the seizure and sale of the property was void because the sale was conducted by a private party. The court held that "[t]he regulations prescribing the manner and conditions of the sale do not prohibit the Secretary from using the services of a private auctioneer." Pet. App. B7.

In a petition for rehearing, petitioner argued for the first time that, (i) unlike Section 6335 of the Internal Revenue Code of 1986 (codified at 26 U.S.C. 6335), the statutes at large that contain the Internal Revenue Code of 1939 set forth an additional requirement that, to be valid, notices of seizure and sale must be left with some person of suitable age and discretion at the usual place of abode where the seizure is made, (ii) that the statutes at large, rather than the codified provisions of the Internal Revenue Code of 1986, should govern this matter and (iii) that the requirement for personal service contained in the statutes at large was not met in this case. The court of appeals denied the petition for rehearing without addressing petitioner's new argument. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The government may seize and sell property upon which it has levied to collect a tax debt. 26 U.S.C. 6331(b). Section 6335 of the Internal Revenue Code provides procedural requirements for such seizures and sales. *Powelson* v. *United States*, 979 F.2d 141, 143 (9th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991).[2]

Section 6335(a) requires that notice of seizure and notice of sale either shall be given to the owner of the property "or shall be left at his usual place of abode or business * * * ." 26 U.S.C. 6335(a) (emphasis added). The declaration of the IRS Revenue Officer established that she went to petitioner's residence to serve him with notice of seizure and notice of sale, but that no one was home. Her declaration further established that she then left the notices at petitioner's home, as the statute provides. Pet. App. B4; see Pet. 12-13. The court of appeals thus correctly held (Pet. App. B4) that leaving the notices at petitioner's residence satisfied the plain terms of the statute.

2. Petitioner contends (Pet. 11-16) that, although Section 6335(a) of the 1986 Code does not require that notices of seizure and sale be left with some person of suitable age and discretion at the usual place of abode where the seizure is made, the statutes at large that set forth Sections 3693(a) and 3701 of the Internal Revenue

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[2] A failure of the Internal Revenue Service to comply with the procedural requirements of Section 6335 can invalidate the seizure or sale. *Goodwin* v. *United States*, 935 F.2d at 1065.

Code of 1939, ch. 36, 53 Stat. 452, 453, do contain such a requirement. Petitioner claims that this requirement of personal service in the 1939 Code should govern in any conflict with Section 6335 of the 1986 Code, which petitioner claims has not been enacted into positive law. These contentions are both untimely and incorrect.

a. This new argument was first presented by petitioner in the petition for rehearing, and the court of appeals denied the petition without addressing it. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. * * * 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)). Petitioner has failed to demonstrate any reason why an exception to this rule should be made in this case.

b. In any event, petitioner's new contention is based on the faulty premise that the Internal Revenue Code of 1939 is still in effect. The Internal Revenue Code of 1954 was enacted on August 16, 1954, ch. 736, 68A Stat. 3, and was redesignated as the Internal Revenue Code of 1986 on October 22, 1986, Pub. L. No. 99-514, § 2(a), 100 Stat. 2095. Section 7851(a)(6) of the 1986 Code, which was enacted as part of the 1954 Code, repealed the provisions of the 1939 Code upon which petitioner relies.[3] Moreover, Section 6335 of the Internal Revenue Code of 1954, which is found at 68A Stat. 785-786, is now part of the Internal Revenue Code of 1986.

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[3] Except for a minor amendment, Section 7851 has remained unchanged since its enactment. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1906(b)(13)(A), 90 Stat. 1834.

26 U.S.C. 6335. That provision of the 1986 Code, and not its predecessor in the 1939 Code, is controlling here.

c. Furthermore, contrary to petitioner's contention, there is no material difference between Section 6335 of the 1986 Code and the corresponding provisions of the 1939 Code, as applied to this case. Section 6335 of the 1986 Code was derived from Sections 3693, 3695, 3701, and 3712 of the 1939 Code. Section 6335(a) of the 1986 Code is descended from Section 3701(a) of the 1939 Code (entitled "Notice to Owner" and located in "Part II-Distraint on Real Estate"). 53 Stat. 453. Both Section 6335(a) and its predecessor, Section 3701(a) of the 1939 Code, provide that notice of seizure may be given to the owner of the seized property by leaving written notice at his "usual place of abode." Petitioner's reliance on Section 3693(a) of the 1939 Code (entitled "Account and Notice to Owner" and located in "Part I-Distraint on Personal Property") is misplaced. 53 Stat. 451, 452. That Section applied only to seizures of *personal* property. When personal property was seized, that statute required a copy of "an account of the goods or effects distrained" to be "left with the owner or possessor of such goods or effects, or at his dwelling or usual place of business, with some person of suitable age and discretion, if any such can be found." 26 U.S.C. 3693 (1940). That Section had no relevance to the procedures to be followed in seizing real property of the type involved in this case.[4]

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[4] Petitioner errs in claiming (Pet. 6-8) that the decision in this case conflicts with decisions of this Court, of other circuits and of the Tenth Circuit itself. The decisions cited by petitioner stand for a general rule that the relevant Sections of the Internal Revenue Code are to be strictly construed. Nothing in the decision below conflicts with those decisions.

3. Petitioner errs in claiming (Pet. 17) that the IRS improperly delegated responsibility for conducting the sale of his residence to a private auction company. Petitioner contends that a private auction company is not an "officer, employee, or agency of the Treasury Department" within the meaning of Section 7701(a)(12)(A)(i) and therefore cannot qualify as a "delegate" of the Secretary of the Treasury in conducting the sale of the property. Pet. 17-20.

The manifest flaw in petitioner's argument is that neither the statute nor its implementing regulations (26 C.F.R. 301.6335-1(c)(6))[5] requires that the Secretary or an officer or employee of the Treasury conduct the sale. Section 6335(e)(1)(A) of the Code directs the Secretary of the Treasury to determine the minimum bid price and to resolve whether the government will seek to purchase the property at that price. 26 U.S.C. 6335(e)(1)(A). And, Section 6335(e)(2) directs the Secretary to "prescribe the manner and other conditions of the sale of property seized by levy." 26 U.S.C. 6335(e)(2). Nothing in either of these provisions or their implementing regulations, however, requires the Secretary or any other Treasury officer or employee personally to conduct the sale of the seized property. Moreover, nothing in these provisions bars the Secretary or his delegate from authorizing a private party to conduct the sale. See 26 C.F.R. 301.6335-1(c)(6). A private party may therefore conduct such a sale when the Secretary or his delegate authorizes that party to do so. *Andrew Crispo Gallery, Inc.* v. *Commissioner*, 68

[5] Petitioner cites (Pet. 17) to 26 C.F.R. 301.6335-1(c)(5). That regulation was redesignated as 26 C.F.R. 301.6335-1(c)(6) by T.D. 8691, 1997-1 C.B. 207, 208.

T.C.M. (CCH) 1187 (1994), rev'd on other grounds, 86 F.3d 42 (2d Cir. 1996).

In this case, the private auctioneer was properly authorized to conduct the sale of the property. The Secretary of the Treasury has delegated the power to collect taxes to the district directors of the IRS. 26 C.F.R. 301.6331-1(a); see Pet. App. B7. The Denver District Director delegated to the IRS Revenue Officer the power to collect the unpaid tax liabilities of petitioner and his wife and, in particular, to seize and sell their real property to satisfy those liabilities. In addition, the Revenue Officer was authorized to retain the services of a private auctioneer to conduct that sale. Pet. App. C6; B. Doc. 16, Quinn Decl. ¶¶ 1, 2.[6] Petitioner's assertion that the sale conducted by private auctioneer in this case was unauthorized is therefore plainly incorrect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] "B. Doc." references are to the docket control numbers assigned to the documents in the original record by the Clerk of the bankruptcy court.